

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ADMIRALTY AND VICE ADMIRALTY JURISDICTION

ADMIRALITY SUIT NO.11 OF 2002

M/s.Anjani Enterprises Ltd, a Company)
incorporated under the Companies Act,)
1956 and having its registered office at)
26, Church Road, Gopal Bhawan,)
Silliguri 734 401 and its branch office)
at "White Tower", 2nd Floor, 115 College)
Street, Calcutta 700 012.)...Plaintiffs

Versus

1. m.v.WAN HAI 303, a foriegn flag)
vessel presently at port JNPT)
within the territorial waters of)
India together with her hull, tackle,)
engines, machienry, boats, apparel)
and other paraphemalia.)
2. m.v.WAN HAI 213, a foreign flag)
vessel which trades in the)
territorial waters of India together)
with her hull, tackle, engines,)
machinery, boats, apparel and other)
paraphemalia.)
3. Wan Hai Limited, Company organized)
under the foreign laws and having its)
office at 10th Floor, 130 Sung Chiang)
Road, Taipei, Taiwan, ROC and)
carrying on business through their)
agents Omega Shipping Pvt Ltd,)
Hansraj Damodar Trust Building,)
Ground Floor, 12/14 Goa Street,)
Estate, Mumbai 400 038.)
4. M/s.Volkart Fleming Shipping and)
Services Limited, 4th Floor, 19,)
J.N.Heredia Marg, Ballard Estate,)
Mumbai 400 001.)
5. M/s.Kutch Shipping Agency Pvt Ltd.,)
a company incorporated under the)
Companies Act, 1956 and having its)
registered office at 19/20, Ajanta)
Comm. Centre, Gandhidham,)
Gujarat 370 201.)

6. M/s.Dattar Lines, a division of)
M/s.Kutch Shipping Agency Pvt Ltd.,)
and having its registered office at)
19/20, Ajanta Comm. Centre,)
Gandhidham, Gujarat 370 201, and)
at 174, Kusum Vijay House, 2nd Floor,)
Room No.7, Modi Street, Fort,)
Mumbai 400 001.)
7. M/s.Canadian Cereals Ltd., a foreign)
company having its office at Room)
29003 Admiralty Centre, Tower 1, 19,)
Harcourt Road, Hongkong and at 15A,)
Southern Commercial Building,)
11 Luart Road, Wanchai, Hongkong.)...Defendants
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Shri Sunip Sen and Ashwin Shankar i/by R.A.Fernandes
for the Plaintiffs.

Shri T.N.Subramaniam, Sr Advocate i/by V.Subramaniam
for the Defendant Nos.1 to 3.

Shri Rahul Narichania with Ms Sumani i/by Bhatt and
Saldhana for the Defendant No.4.

Shri Umesh Shetty for the Defendant Nos.5 and 6.

CORAM : ABHAY S.OKA, J.

**DATE ON WHICH JUDGMENT
IS RESERVED. : 04TH OCTOBER, 2007.**

**DATE ON WHICH JUDGMENT
IS PRONOUNCED. : 19TH NOVEMBER, 2007.**

JUDGMENT:

1. The plaintiffs have filed this suit for various
reliefs including a decree against the defendants for
a sum of US \$ 36,180 as per the particulars of claim
shown in Exhibit 'A' annexed to the plaint together
with further interest thereon at the rate of 12% per

annum from the date of institution of the suit till realisation.

2. According to the case of the plaintiffs, the first defendant is the foreign flag vessel and at the time of institution of the suit the said vessel was in the port of JNPT within the territorial waters of India and the admiralty jurisdiction of this Court. The second defendant is also a foreign flag vessel. It is case of the plaintiffs that the first and second defendant vessels are owned by the third defendants. It is alleged that the second defendant is a sister ship of the first defendant.

3. According to the case of the plaintiffs the third defendants are a company incorporated under the laws of Taiwan having their registered office as shown in the cause-title of the plaint. It is stated that a mates receipt and bills of lading were issued by the fourth defendant company on behalf of the third defendants. According to the case of the plaintiffs the fourth defendants are a company incorporated under the Companies Act, 1956 and the said defendants have acted as agents on behalf of the second and third defendants and are empowered to issue bills of lading and mate receipts on behalf of their agents i.e the

third defendants. According to the plaintiffs, the fifth defendants are a company incorporated under the Companies Act, 1956 and have acted as multimodal transport operators jointly with the third and fourth defendants. It is alleged that the fifth defendants have been empowered by the third and fourth defendants to issue receipts/documents in the nature of bills of lading/multimodal transport documents in respect of cargo that may be carried and entrusted for shipment on the first and second defendant vessels. The plaintiffs have submitted in the alternative that the fifth defendants have acted as constituents on behalf of the third, fourth and sixth defendants.

4. It is alleged in the plaint that the sixth defendants are agents of the fifth defendants and the sixth defendants have issued multimodal transport documents. It is alleged that the sixth defendants are principles of the fifth defendants and that the sixth defendants have also acted as constituents on behalf of the first, second and third defendants.

5. According to the case of the plaintiffs, the seventh defendants placed an order upon the plaintiffs for shipment of sesame seeds. The contract of sale was duly confirmed by a confirmatory note dated 10th

August, 2001 and pursuant to the said contract, the plaintiffs sold various grades of sesame seeds to the seventh defendants. As per the terms of the sale contract, the plaintiffs were required to draw the invoices for the value of the cargo and full payment of invoice value was required to be made on presentation of the documents at site by the bankers of the seventh defendants. The plaintiffs' bankers Oriental Bank of Commerce, Calcutta were required to forward the documents to the bankers of the seventh defendants. It is alleged that as per the terms of the contract, the sale was a "Free on Board" basis and therefore, the plaintiffs were responsible only to the extent of ensuring that the cargo containing the goods was loaded on board of vessel.

6. The seventh defendants had required the plaintiffs to contact the fifth defendants for the shipment of goods. The fifth defendants directed the plaintiffs to contact the third and fourth defendants who would be responsible for the carriage. The plaintiffs ascertained that the second defendant vessel was expected around the time when the plaintiffs were required to ship the goods. The plaintiffs were allegedly informed that the third and fourth defendants would be instrumental in protecting

the shipment by receiving, loading and discharging the cargo at the destination contracted for by the plaintiffs and by issuing requisite receipts/bills of lading.

7. The plaintiffs entrusted the containers after obtaining clearance of the custom authorities. The fourth defendants issued a mate receipt to the plaintiffs for rolled sesame seeds in 1800 bags. On the basis of the said mate receipt, the plaintiffs approached the fourth defendants for issuance of a bill of lading since the bill of lading was required for the purpose of receiving payments of the said consignment through the authorised channel of the plaintiffs bankers. Though the fourth defendants were obliged to issue bill of lading, on their directions the plaintiffs approached the fifth defendants. The fifth defendants accordingly issued the bill of lading in the nature of a multimodal transport documents as agents for the sixth defendants. In the said multimodal transport document, the plaintiffs were shown as the shippers. In the column of notified address, the name of the seventh defendant has been shown. According to the case of the plaintiffs, in the multimodal transport document in the column "consignee (or order)", the words "to the order" have

been shown. According to the plaintiffs, such multimodal transport documents protect the shippers and the goods become deliverable only upon production of the original set of bills of lading/multimodal documents which get endorsed by the bank in favour of the holder thereof for the value. According to the case of the plaintiffs, they continue to be entitled to the goods until the receipt of the payment which entitles the buyer to receive various documents with the endorsement that on presentation of the documents, the holder thereof is entitled to receive the goods for value as a buyer.

8. After receiving the multimodal transport documents from the fifth and sixth defendants, the plaintiffs submitted the same to the Oriental Bank of Commerce. The plaintiffs submitted invoice and packing list to the said bankers alongwith a certificate of origin, a certificate of weight and quantity etc. The said documents were submitted by the plaintiffs to enable their bankers in turn to forward the same to the seventh defendants' bankers who became responsible for recovery of the payment from the seventh defendants and to have the said payment remitted to the plaintiffs' bankers. The full set of documents could have been handed over to the

seventh documents only on the basis of payments thereby entitling the seventh defendants to clear and receive the consignment at the port of destination namely Kaohsiung in Taiwan.

9. According to the plaintiffs, as the payments were not forthcoming, they made enquiries and were shocked to learn that the defendants were responsible for misdelivery of the cargo to the seventh defendants in connivance and collusion with each other without the seventh defendants retiring the documents from their bankers against the value towards the payment of the invoices. The plaintiffs have stated that the fifth and sixth defendants were acting as constituents on behalf of the second and third defendants. It is alleged that there is another contract between the plaintiffs as a third party and the vessel/owners as principals where the fourth and fifth defendants acted as constituents.

10. It is alleged that further enquiries made by the plaintiffs revealed that in connivance with each other the fifth and sixth defendants and the second and third defendants have had some arrangement amongst themselves whereby the fourth defendants made it possible to give misdelivery of the consignments to

the seventh defendants by rendering the multimodal document issued by the fifth and sixth defendants nugatory.

11. The plaintiffs have alleged that the defendants have caused loss to them in the sum of US\$ 36,180 being the value of the invoices raised by the plaintiffs. It is alleged that breaches were caused by various acts of omission, connivance, collusion, misfeasance and malfeasance of the second to seventh defendants.

12. The first to third defendants contested the suit by filing their written statement. According to the case made out by the said defendants, the second defendant vessel for and on account of Orient Overseas Container Line (hereinafter referred to as OOCL) for whom the fourth defendants were agents did safely carry and discharge the containers from the JNPT to the port of destination. It is stated that at the port of destination, the said OOCL took charge of the containers in the like order and condition that they had been loaded on board on second defendant vessel and on taking over of the said containers the role of the second defendant vessel came to an end. It is alleged that the third defendants have nothing to do

with the carriage or transaction which is subject matter of the suit. It is stated that the said first to third defendants did not have any contract and/or agreement with the plaintiffs.

13. The first to third defendants denied that the fourth defendants were their agents and that the fourth defendants had issued any mate receipt for and on behalf of the said defendants. The said defendants stated that they had not empowered the fourth defendants to issue any mate receipts and or bill of lading for and on their behalf. The first to third defendants denied that they were having any relationship with fourth and/or the fifth and/or the sixth defendants. The said defendants contended that they had never empowered the fifth defendants to issue any documents for any cargo that had been entrusted for shipment on the second defendant vessel. It is alleged that the fifth and sixth defendants are neither their constituents nor their agents. The said defendants have reiterated that the second defendant carefully loaded the containers and discharged the containers to the port of destination on account of and for on behalf of OOCL and the said defendants have nothing to do with the transaction subject matter of the suit. The said defendants contended that they

were not responsible for causing any loss to the plaintiffs and suit as against them was not maintainable.

14. The fourth defendants filed written statement opposing the claim of the plaintiffs. The contention of the fourth defendants is that the plaintiffs had a privity of contract only with the fifth and sixth defendants as evidenced by multimodal document dated 22nd September, 2001 issued by the fifth defendants as agents of the sixth defendants. The fourth defendants contended that there was no privity of contract between the plaintiffs and them.

15. The fourth defendants contended that at no point of time they have been agents of the third defendants and it appears that the plaintiffs were fully aware of the said fact. The fourth defendants contended that they are the agents in Mumbai for OOCL, Hongkong. The fourth defendants contended that they being agents of a disclosed principal namely OOCL Ltd, Hongkong the suit cannot lie against the said defendants in view of section 230 of the Indian Contract Act, 1872. It is the contention of the fourth defendants that the mate receipts issued by them does not establish privity of contract between

them and the plaintiffs.

16. The fifth and sixth defendants filed their written statement. In the said written statement they contended that the bills of lading were issued by the said defendants mentioning the delivery agents as the Express Talent Holding Ltd, HongKong. It is alleged that without knowledge of the fifth and sixth defendants and without their authority, the said Express Talent Holding Ltd issued a fresh set of bills of lading in respect of plaintiffs goods to Canadian Cereals Ltd i.e seventh defendants. It is contended that the action of M/s.Express Talent Holding Ltd was completely illegal and therefore, the said defendants are not liable for the said action of M/s.Eastern Talent Holding Ltd.

17. The said defendants contended that they have not released the goods with the buyers at the port of destination and the goods were illegally released by the delivery agents by issuing authorised bills of lading. It is, therefore, submitted that M/s.Express Talent Holding Ltd were necessary and proper parties to the suit and the suit was not maintainable on account of their non-joinder. The fifth and sixth defendants denied that the sixth defendants are the principals of

the fifth defendants. They reiterated that the fifth defendants were shipping agents. The said defendants submitted that no liability can be foisted against them.

18. The seventh defendants did not file any written statement though writ of summons was duly served to them.

19. The following issues were settled:

- "1. Whether the plaintiffs prove that they are entitled to maintain the suit and consequent claim against the defendants?
2. Whether the plaintiffs prove that they were entitled to arrest the defendant No.1 vessel?
3. Whether the plaintiffs establish a privity of contract and cause of action against the 1st, 2nd and 3rd defendants?
4. Whether the plaintiffs prove that the mates receipt establishes privity of contract against defendant No.4 and

imposes a duty of care as a carrier as alleged in the plaint?

5. Whether the plaintiffs prove that there was collusion and/or connivance between the defendants leading to allegation?
6. Whether the defendant Nos.1, 2 and 3 prove that the 1st defendant vessel was wrongfully arrested. If so, what damages are they entitled to?
7. Whether the 4th defendants prove that they are the agents of a disclosed principle in Mumbai named Orient Overseas Container Line Ltd, Hongkong and if so, they are not liable to the plaintiffs?
8. Whether the plaintiffs prove that the 4th defendants acted as agents of the 1st, 2nd and 3rd defendants?
9. Whether the plaintiffs prove that the 4th defendants were obliged to issue a bill of lading to cover the entire

consignment?

10. Whether the plaintiffs prove that the 4th defendants directed the plaintiffs to approach the 5th defendant for the bill of lading?
11. Whether the plaintiffs prove that the 4th defendants had some arrangement with the 5th defendants and the 3rd defendants?
12. Whether the plaintiffs prove that the 5th and 6th defendants have acted as constituents on behalf of the 1st, 2nd, 3rd and 4th defendants?
13. Whether the 5th and 6th defendants prove that Express Talent Holding Ltd, Hongkong are a necessary party and hence their non-joinder in this suit renders it as non-maintainable against defendant Nos.5 and 6?
14. Whether the plaintiffs prove their claim of US \$ 36.180?

15. Whether the defendant Nos.1 to 3 and 4 prove that this Court has jurisdiction?

16. Whether the defendant Nos.1 to 3 and 4 prove that the suit is barred by limitation?

17. What order and what relief"?

20. The plaintiffs examined two witnesses. The first witness was Mr. Sunilkumar Agarwala, a Director of the plaintiffs. The second witness examined by the plaintiffs is one Mr. Mahesh Joshihar. The first to third defendants examined one Mr. Paul Lin as their witness. The fourth defendants examined Mr. Kiran Talawdekar as their witness. The fifth and sixth defendants did not examine any witness. As stated earlier the seventh defendants did not appear at any stage though they were served with the writ of summons. The examination-in-chief of the witnesses was in the form of affidavits and the cross-examination was recorded by Court Commissioner appointed by this Court. By a detailed order dated 10th August, 2007 this Court decided issue of admissibility and proof of the various documents

produced by the parties to the suit.

21. Mr. Sen, learned counsel appearing for the plaintiffs submitted that the seventh defendant has not entered appearance and therefore, a decree must follow as against the seventh defendant. He submitted that the fact that the goods agreed to be sold to the seventh defendant were verified by the Excise Department and were stuffed in containers has been proved by the evidence on record. He submitted that in view of the mate receipts admittedly issued by the fourth defendants, it is obvious that the plaintiff was the shipper of the goods. He submitted that the EGM filed by the first to third defendants shows that the said defendants were aware even prior to discharge of the goods that the plaintiffs were shippers. He submitted that the fifth defendants issued a multimodal transport document for carriage of the goods by the second defendant and the said document is signed by the fifth defendants as agents. He submitted that even with the knowledge that the plaintiffs were the shippers, the fourth defendant issued a bill of lading to the fifth defendants showing the fifth defendants as the shipper. He submitted that the plaintiffs were never aware that the fourth defendant was an agent of OOCL or OOCLL

(Company).

22. He submitted that it is an admitted position that second defendant carried the goods. He submitted that the third defendant has admitted to have carried the goods and had given delivery of the goods without production of the original bills of lading. He submitted that the third defendant has failed to produce a complete copy of the alleged operating Agreement between the third defendants and OOCLL and what has been produced is only part of the Agreement. He pointed out that the operating Agreement authorises OOCLL to book cargo for carriage by the third defendants' ship and to issue bill of lading and mates receipt for carriage by the third defendants' ship. The learned counsel submitted that OOCL and the fourth defendants were acting as agents under the authority given by the third defendants. He submitted that the witness examined by the first to third defendants in response to question No.75 admitted that the plaintiffs were the shippers. He submitted that the second and third defendants have admitted that they discharged the goods to the seventh defendants without their agents retiring the original documents. He submitted that it is an admitted position that the third defendants gave no notice to the plaintiffs that

cargo would be delivered without bills of lading.

23. He submitted that the fourth defendants claim to have acted for disclosed principals (OOCL) but no such disclosure was made till date. He submitted that the fourth defendants after issuing mate receipt ought to have issued bills of lading to the shipper. He submitted that liability of the fourth defendants is not excluded by section 230 of the Indian Contract Act. He submitted that the fourth defendants after knowing fully well that the plaintiffs were shippers could not have issued a bill of lading in favour of the fifth defendant. He pointed out that the fifth defendant surrendered bill of lading to the fourth defendant in Mumbai itself and therefore the fourth defendant must be in possession of the said bill of lading. He submitted that the delivery of the goods is given without production of the bill of lading. He therefore submitted that there was an arrangement between the fourth defendants and fifth defendants. He submitted that it is not even the case made out by any of the defendants that the plaintiffs had knowledge that fourth defendant had issued a bill of lading in favour of the fifth defendants and that the fifth defendants had surrendered the said bill of lading.

24. The learned counsel for the plaintiffs submitted that the second and third defendants are certainly liable for the loss suffered by the plaintiffs due to non payment by the seventh defendants as the said second and third defendants admittedly carried the goods and delivered the same without production of bill of lading. He submitted that the fourth defendant is liable as admittedly the fourth defendant issued mate receipt acknowledging receipt of the goods. He submitted that the fifth defendant is liable as the fifth defendants had issued a multimodal transport document.

25. The learned senior counsel appearing for the first to third defendants has taken me through the oral evidence. He submitted that there is no privity of contract between the plaintiffs and first to third defendants as the plaintiffs have not dealt with the first to third defendants. He submitted that the second witness examined by the plaintiffs admitted that the plaintiffs were aware that the fourth defendant was acting for OOCL. He submitted that there is no material on record to show that the fourth defendant acted as agents of the first to third defendants or under an authority conferred by first to

third defendants. He submitted that the fifth and sixth defendants have no contractual relationship with the first to third defendants and in any event the plaintiffs have not established that fifth or sixth defendants acted as agents of the first to third defendants. He submitted that the record shows that the delivery of the goods was taken by M/s.Express Talent Holding Ltd by producing bills of lading. He submitted that in so far as the first to third defendants are concerned, they were not made aware at any time that the plaintiffs were the shippers. He submitted that the plaintiffs have miserably failed to establish the case which is pleaded. He submitted that the first to third defendants are entitled to compensatory costs as the first defendant was wrongfully arrested at the instance of the plaintiffs.

26. The learned counsel appearing for the fourth defendants submitted that the fourth defendants were never liable to issue bill of lading to the plaintiffs. He submitted that the plaintiffs have failed to prove that the fourth defendants advised the plaintiffs to take bill of lading from fifth defendants. He submitted that evidence of the second witness examined by the plaintiffs is to the contrary. He submitted that the plaintiffs accepted the bill of

lading/multimodal transport document issued by the fifth defendant without making any grievance and therefore now the plaintiffs cannot contend that the fourth defendants were under obligation to issue a bill of lading. He submitted that the plaintiffs were all along aware that OOCL were the principals of the fourth defendants. He invited my attention to the correspondence made by advocate for the plaintiffs before the institution of the suit. He submitted that the name of M/s.Express Talent Holding Ltd is incorporated in the multimodal transport document issued by the fifth defendants as collection agents. He submitted that the plaintiffs ought to have impleaded M/s.Express Talent Holding Ltd as a party defendant. He submitted that no loss has been caused to the plaintiffs as a result of fourth defendants issuing bill of lading in favour of the fifth defendants. He submitted that the fourth defendants always acted for a disclosed principal to the knowledge to the plaintiffs and hence suit against the fourth defendant will not lie.

27. The learned counsel for the fifth and sixth defendants submitted that the multimodal transport document issued by the fifth defendant itself discloses that M/s.Express Talent Holding Ltd were

necessary and proper parties to the suit.

28. The learned counsel for the plaintiffs by way of rejoinder submitted that the fifth and sixth defendants have not led any oral evidence. He submitted that the first to third defendants cannot escape from the liability. He submitted that only on the basis of mate receipt issued by the fourth defendants, the said defendants are liable to compensate the plaintiffs.

29. I have carefully considered the submissions made by the learned counsel appearing for the parties. It will be necessary to refer to the case made out by the plaintiffs in the plaint. In paragraph 20 of the plaint the plaintiffs have summarised the causes of action available against various defendants. Paragraphs 20.2 to 20.7 of the plaint read thus:

"20.2 The 2nd Defendant was the carrying vessel for the consignment. It has breached its duty of care to deliver the cargo upon production of the original of the Multimodal Transport Document as required. there has been a breach of contract and duty of care

owned to the Plaintiffs. Hence, this action for recovery.

20.3 The 3rd Defendants as owners of both the 1st and 2nd Defendant vessels were the company that was involved the carriage of the cargo both in contract and in tort. It's agents (4th Defendants) issued Mate's Receipts to the Plaintiffs and also Multimodal Transport Documents through its other agents the 5th and 6th Defendants. There is a breach of contract of a carriage and duty of care of the Plaintiffs' cargo and thus liable in personam and in rem. Hence, this action for a decree in personam for the Plaintiffs' claim.

20.4 The 4th Defendants were the agents of the 3rd Defendants. It had issued the Mate's receipt and accepted the cargo for shipment. They have an office of the 3rd Defendants within the jurisdiction of this Hon'ble Court. On account of the breach by the 3rd

Defendants and failing to issue Bills of Lading in consonance with the Mate's Receipts, losses were caused to the Plaintiffs. Hence this action against these Defendants.

20.5 The 5th Defendants were the company nominated by the buyers. On the basis of numerous misrepresentations being made by it, the Plaintiffs were induced into entering into this contract with the 3rd and 4th Defendants wherein the 6th Defendant was also a constituent. The 5th Defendant was also a constituent of the 6th Defendant. Losses were thus caused to the Plaintiffs and hence the action for recovery.

20.6 The 6th Defendants were the issuers of the Multimodal Transport Document. They have in collusion and connivance with the other Defendants issued a Multimodal Transport Document which is not in conformity with the Plaintiffs requirement and trade and have thus

caused losses to the Plaintiffs by making it possible that the consignees obtained delivery without making payment in respect of the consignment the 6th Defendants by issuance of the Multimodal Transport document are also jointly and/or severally liable in personam for all losses caused to the Plaintiffs.

20.7 The 7th Defendants were buyers of the cargo who have taken wrongful delivery of the cargo without making payment for the same. Consequently, the plaintiffs are unpaid sellers. The 7th Defendants are thus responsible for conversion and have benefited in a conspiracy with Defendants Nos.2,3,4,5 and 6 against the Plaintiffs and Government of India".

30. In so far as sixth defendants are concerned, it is not a legal entity and it is described as a division of the fifth defendants. The multimodal transport document has been issued by the fifth defendants and therefore it is obvious that the

plaintiffs have no case as against the sixth defendants. The plaintiffs have alleged that the fourth defendants were agents of the first to third defendants. In paragraph 20.3 the plaintiffs have alleged that even the fifth defendants were agents of the first to third defendants.

31. The plaintiffs have examined Mr. Sunilkumar Agarwala as their first witness. In clause (b) of paragraph 3 of his affidavit-in-lieu of examination-in-chief it is specifically asserted that the fourth defendants on the basis of having acted as agents on behalf of the second and third defendants issued a mates receipt acknowledging receipt of the cargo. A specific case has been made out in the said clause (b) that though the fourth defendants were under obligation to issue bill of lading, the fourth defendants advised the plaintiffs to approach the fifth defendants who were the constituents for issuance of the bill of lading in confirmation of the receipt of the goods which were shipped on the board of the second defendant. The said witness admitted in the said clause (b) that the fifth defendants issued a bill of lading in the nature of the multimodal transport document. In clause (j) of paragraph 3 of the said affidavit, the said witness has asserted that

the fifth defendants were nominated as shipping agents of the second and third defendants. In the said clause (j) it is reiterated that the fourth defendants were agents of the third defendants.

32. It will be necessary to refer to letter dated 28th January, 2002 sent by the advocate for the plaintiffs to the fourth defendants. In the said letter the plaintiffs have not asserted that the fourth defendants acted as agents of the first to third defendants. In letter dated 17th January, 2002 sent by the advocate for the plaintiffs to the fifth defendants, the plaintiffs have not alleged that the fifth defendants have acted as shipping agents of the first to third defendants. In letter dated 29th January, 2002 sent by the same advocate of the plaintiffs to the seventh defendants it is simply alleged that in accordance with the sale contract, the plaintiffs shipped the cargo through the fifth defendants who have been nominated by the seventh defendants to issue bills of lading in which the plaintiffs were shown as shippers. In the said letter there is not even a reference to the fourth defendants or to the fact that the fifth defendants were shipping agents of the first to third defendants. Thus, the case which is made out in the plaint does not find

place in the correspondence made by the plaintiffs through their advocate prior to the institution of the suit.

33. Before adverting to the evidence of the second witness of the plaintiffs it will be necessary to refer to the cross-examination of the first witness. In response to question No.103 the witness sated that he presumed that fourth defendants were acting as agents of the second and third defendants. He admitted that the mate receipt issued by the fourth defendants does not show that it is issued on behalf of the second and third defendants. In response to question No.39 the witness stated that he had no personal knowledge of the fact that the fourth defendants advised the plaintiffs to approach the fifth defendants for issuing a bill of lading. He stated that said statement in the affidavit is made on the basis of information given by the clearing house agents. In response to question No.41 he admitted that he had no personal knowledge whether the fifth defendants are the agents of the defendant Nos.2,3 and 4. The said witness admitted that he had knowledge and information of M/s. Express Talent Holding Ltd prior to filing of the suit. He stated that when the plaintiffs received bill of lading they came to know

about M/s.Express Talent Holding Ltd. In response to question No.195 the witness admitted that when the plaintiffs received multimodal transport document they did not raise any objection in writing against the said document. In reply to question No.196 the witness candidly admitted that the fifth and sixth defendants were made parties to the suit on the basis that they were agents and for no other reason.

34. A reference will have to be made to the evidence of Mr. Mahesh Joishar, the second witness of the plaintiffs. In paragraph No.5 of his affidavit he has stated that on the basis of statement contained in the sale contract and on the basis of the instructions of the Plaintiffs he contacted the fifth defendants. He stated that he was instructed to collect the empty containers from OOCL . The witness specifically stated that he thereafter contacted OOCL's agents M/s. Volkart Fleming (the fourth defendant herein) for collection of the delivery orders for empty OOCL containers. He stated that the goods were stuffed in three containers received by him. He stated that the Excise Department verified the contents and quality of the consignment as well as the value of the same. In paragraph No.7 the said witness stated that he obtained a mate receipt from the fourth defendants and

as per instructions of the fourth defendants he approached the fifth defendants for collecting the bill of lading. In the said paragraph the said witness stated that "accordingly Kutch Shipping informed me that they had acted as agents on behalf of OOCL and issued the requisite bill of lading...". The said witness admittedly acted as Customs House agent of the plaintiffs. As stated above the said witness admitted that he was aware that the fourth defendants were acting as agents of OOCL and even fifth defendants were acting as agents of OOCL. The said witness has not stated that the fourth defendants or fifth defendants acted as agents of the second and third defendants. As pointed out earlier, the first witness of the plaintiffs admitted that he had no personal knowledge whether the fifth defendants were acting as agents of the second and third defendants and he was saying so on the basis of the information given by the house clearing agents. The second witness who is the house clearing agent has stated that he was aware that both fourth and fifth defendants were acting as agents of OOCL. In the cross-examination he admitted that the three containers in which the goods were stuffed were collected from Muhul Warehouse Company which is empty container yard of OOCL. In reply to question No.70,

the witness reiterated that he was aware that fourth defendants are the agents of OOCL. In response to question No.122 the said witness admitted that the mate receipt was issued by the fourth defendants as agents on behalf of the OOCL. Thus, the plaintiffs cannot contend that at the relevant time they were not aware that the fourth and fifth defendants were acting as the agents of OOCL.

36. The third defendants had produced a copy of operating Agreement between the third defendants and Orient Overseas Container Line Limited (OOCL). The said Agreement shows that the third defendant had agreed to provide number of slots on its vessel to OOCL. The said operating Agreement has been duly proved. The witness examined by the third defendant in response to question No.60 stated that the cargo was moved by OOCL on their own slots under the operating Agreement and therefore the fourth defendant did not issue the receipt on behalf of the first to third defendants.

37. The perusal of the evidence, both oral and documentary, shows that the plaintiffs could not substantiate their case that the fourth defendants acted as agents of the first to third defendants. The

plaintiffs also could not establish that the fifth defendants acted as agents of first to third defendants. As pointed out earlier the first witness of the plaintiff Mr. Sunilkumar Agarwala admitted that the plaintiffs had impleaded the fifth and sixth defendants only in their capacity as agents and in no other capacity. It must be remembered here that fourth defendants have not been impleaded as a carrier of goods. The second witness of the plaintiffs has candidly admitted that the fourth defendants were acting as agents of OOCL and even the fifth defendants were acting as the agents of OOCL. It is an admitted position that even the containers in which goods were stuffed were provided by OOCL. The witness examined by the third defendants proved that the cargo was carried by the third defendants on the second defendant vessel under the operating Agreement with OOCL. Admittedly, there is no contractual relationship between the plaintiffs and first to third defendants. Even before the institution of the suit the house clearing agent of the plaintiff was fully aware that the fourth and fifth defendants was acting for a disclosed principal namely OOCL. The multimodal transport document executed by the fifth defendants clearly discloses that the same was issued by the fifth defendants 'as agents'. There is nothing on

record to show that the fourth and fifth defendants had undertaken any personal liability. Hence, the said defendants being the agents of a disclosed principal cannot be held liable in view of section 230 of the Contract Act.

38. Going by the averments made in paragraph 20 of the plaint, the plaintiffs want to pass on the liability to the first to third defendants only on the basis that fourth and/or fifth defendants acted as their agents. The said fact has not been established by the plaintiffs. Therefore, the plaintiffs have failed to establish the liability of first to third defendants.

39. In so far as the seventh defendants are concerned, the contract of sale between the plaintiffs and the third defendants has been proved. The fact that the plaintiffs had dispatched the goods as per the contract is also admitted. The delivery of the goods to the agents of the seventh defendant is also established. The seventh defendants have not appeared and disputed the case that the plaintiffs did not receive the price of the goods. Infact, the case made out by the other contesting defendants is that the delivery of the goods was taken by M/s.Express Talent

Holding Ltd who were the collecting agents of the seventh defendants. It appears that M/s.Express Talent Holding Ltd provided a fresh set of bill of lading to the seventh defendants. Thus, liability of the seventh defendants to pay the price of the goods sold has been duly established and therefore the plaintiffs will be entitled to a decree in terms of prayer clause (c) against the seventh defendants.

40. The first to third defendants have not established that any loss was caused to them as a result of arrest of the first defendant vessel. Therefore, the prayer for grant of compensatory costs cannot be granted.

41. Hence, issues are answered against the plaintiff save and except the fact that liability of the seventh defendants has been established.

42. Hence, I pass the following order:

- (i) The suit as against the first to sixth defendants is dismissed. The plaintiffs will pay costs of the suit to first to sixth defendants.

(ii) The suit stands decreed as against seventh defendants in terms of prayer clause (c). The seventh defendant shall pay costs of the suit to the plaintiffs.

(iii) The parties will be entitled to take back the original documents on record after the decree is sealed.

(iv) Certified copy is expedited.

. On the prayer made by the counsel for the plaintiffs, it is directed that the Bank Guarantee submitted by the first to third defendants shall be kept alive for a period of eight weeks from today.

JUDGE